SUPREME COURT U.S.
FILED
JUL 22 1992
OFFICE OF THE CLERK

No. 91-2064

IN THE

Supreme Court of the United States

SUMMER TERM, 1992

MARY LOU GRAHAM,
Petitioner,

VS.

JEAN GOLDSTEIN,
Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Missouri

BRIEF OF RESPONDENT JEAN GOLDSTEIN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REASONS FOR DENYING THE PETITION

This is a civil action brought by Petitioner who sought to recover damages based upon alleged legal malpractice. Petitioner's sole allegation of professional negligence against Respondent is that she failed to file a timely appeal of an Order denying a Motion for New Trial in a federal civil rights case which was pending in the United States District Court of the Western District of Missouri, which Petitioner tried *pro se*. Summary Judgment was entered in favor of Respondent and Petitioner appealed to the Missouri Court of Appeals, Western

District. On July 30, 1991, the Missouri Court of Appeals filed its Order and Memorandum Supplementing Order affirming Judgment in favor of Respondent. The Petitioner filed a Motion for Rehearing in the Missouri Court of Appeals, Western District, which was not accepted for filing because it was not timely. Petitioner did not file a Motion to Transfer to the Supreme Court of Missouri. Thereafter, Petitioner filed a Motion for Relief of Order in the Supreme Court of Missouri which was overruled. Then, Petitioner filed a Motion for Rehearing in the Supreme Court of Missouri which was overruled. On June 22, 1992, Petitioner filed her Petition for Writ of Certiorari in this Court.

This case presents no basis to authorize review of the Order of the Supreme Court of Missouri by Writ of Certiorari. Petitioner did not perfect an appeal to the Supreme Court of Missouri. Nearly six months after the entry of the Order affirming Judgment by the Missouri Court of Appeals, Western District, Petitioner filed what she entitled as a Motion for Relief of Order. The Order, which is the subject of this Petition for Writ of Certiorari, is not a decision or judgment which is subject to review by this Court.

In violation of Supreme Court Rule 14.1(h), Petitioner has failed to specify in her Petition at what stage of the state court proceedings a federal question was raised. Indeed, Petitioner could not because the questions presented for review by this Court were not previously raised. In effect, Petitioner now attempts to raise a federal constitutional issue for the first time in this Court. This she may not do.

Furthermore, even if Petitioner properly raised and preserved a federal constitutional issue in the court below, no ground for issuance of a Writ of Certiorari exists. As a matter of law, Petitioner's alleged professional negligence action against Respondent failed as a matter of law.

For these reasons, Respondent respectfully requests that this Court deny the Petition for a Writ of Certiorari.

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER SEEKS REVIEW OF AN ORDER DENYING A MOTION WHICH WAS FILED AFTER THE TIME FOR APPEALING HAD EXPIRED WHICH IS NOT A DECISION SUBJECT TO REVIEW BY THIS COURT.

In this case, Petitioner seeks a Writ of Certiorari from this Court to review the "judgment of Supreme Court of Missouri affirming Summary Judgment for Respondent . . ." Petition for Writ of Certiorari, p. 1. In fact, there has been no judgment of the Supreme Court of Missouri affirming summary judgment in the proceedings below. As mentioned above, the Missouri Court of Appeals, Western District, filed its Order and Memorandum Supplementing Order Affirming Judgment pursuant to Rule 84.16(b) on July 30, 1991. The Petitioner's Motion for Rehearing in the Missouri Court of Appeals, Western District, was not accepted for filing because it was not timely. Petitioner did not file a Motion to Transfer to the Supreme Court of Missouri. Thus, Petitioner did not seek review of the Missouri Court of Appeals' Order Affirming Judgment by the Supreme Court of Missouri in an accepted procedural manner.

Nearly six months after the entry of Order Affirming Judgment by the Missouri Court of Appeals, Petitioner filed a Motion for Relief of Order with the Supreme Court of Missouri. This motion was overruled on February 25, 1992 and is the "judgment" which Petitioner requests this Court to review. It should be noted that Petitioner does not invite review of the July 30, 1991 Order of the Missouri Court of Appeals, Western District. This is not surprising in that the time for petitioning for review of that Order has long since expired pursuant to Supreme Court Rule 13.1.

Undoubtedly, the Order of the Supreme Court of Missouri overruling Petitioner's Motion for Relief is not a judgment contemplated for review by Supreme Court Rules 10 and 13. Astoundingly, the issues presented for review in this Court were not even raised in the Supreme Court of Missouri by way of Petitioner's Motion for Relief of Order. Consequently, Petitioner's Motion for Writ of Certiorari should be denied.

II. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER HAS FAILED TO SPECIFY THE PARTICULARS, IF ANY, CONCERNING EARLIER PROCEEDINGS INVOLVING A FEDERAL QUESTION.

Petitioner seeks a Writ of Certiorari from this Court to address alleged deprivation of constitutional rights. The Petitioner for Writ of Certiorari should be denied because Petitioner has failed to specify the particulars, if any, concerning earlier proceedings on a federal constitutional question.

Supreme Court Rule 14 governs the contents of a Petition for Writ of Certiorari. Where the petition invites review of the judgment of a state court, Supreme Court Rule 14.1(h) requires:

> [T]he statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts;

Rule 14 further provides that the failure of a Petitioner to present in a Petition whatever is essential to a ready and adequate understanding of the points under consideration is a sufficient reason for denying the Petition. Sup.Ct.R. 14.5

In the present case, Petitioner has wholly failed to comply with the mandate of Rule 14. The Petition for Writ of Certiorari fails

to specify at what stage of the proceedings before the courts of the State of Missouri, if any, that a federal question was raised or passed upon. Indeed, Petitioner has not only failed to specify the particulars of an alleged federal question, but has also failed to state whether a federal question was ever raised at all in the court below. Consequently, since Petitioner failed to specify the particulars, if any, concerning earlier proceedings on a federal question, the Petition for Writ of Certiorari should be denied.

III. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER CANNOT RAISE FOR THE FIRST TIME ON A WRIT OF CERTIORARI A FEDERAL CONSTITUTIONAL CHALLENGE WHICH WAS NEVER RAISED, PRESERVED OR PASSED UPON IN THE STATE COURTS BELOW.

Petitioner seems to suggest that a Writ of Certiorari should be issued in the present case because of purported violations of constitutional rights. As demonstrated in the previous point, Petitioner has failed to specify whether a federal constitutional question was ever raised at all in the courts of the State of Missouri. A review of Petitioner's appendices shows that the questions presented by Petitioner in this Court were not previously raised. Absent presentation of such an issue in the courts of Missouri, Petitioner cannot raise for the first time on a Writ of Certiorari a federal constitutional challenge which was never raised, preserved or passed upon in the state courts below.

Justice White for the Court stated the rule as follows:

> . . . [T]he fact emerged in oral argument that the sole federal question argued here had never been raised, preserved or passed upon in the state courts below. It was very early established that the Court will not decide federal constitutional issues raised here for the first time on the review of state court decisions. In *Crowell v. Randell,* 10

> Pet. 368 (1836), Justice Story reviewed the earlier cases commencing with *Owings v. Norwood's Lessee*, 5 Cranch 344 (1809), 1789 [citation omitted] vested this Court with no jurisdiction unless a federal question was raised and decided in the state courts below. "If both of these do not appear on the record, the appellate jurisdiction fails." 10 Pet. 368, 391. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the *Crowell* opinion . . . and since . . .

Cardinale v. Louisiana, 394 U.S. 437, 438 (1969).

Consequently, since the record demonstrates that the questions presented before this Court were not raised, preserved, or passed upon in the state courts below, none may be raised in this Court. Thus, the instant Petition for Writ of Certiorari should be denied.

IV. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER HAS NOT DEMONSTRATED SPECIAL AND IMPORTANT REASONS FOR REVIEW BY THIS COURT.

Petitioner invites review of this case because of "the existence of genuine issues of material fact . . .", "the existence of established legal precedent in federal and state cases that govern cases of arrest without probable cause and assault and battery" and because the jury verdict was "against the weight of the evidence and as the cause of manifest injustice to Petitioner." Petition for Writ of Certiorari, page 8.

Supreme Court Rule 10 sets forth the considerations governing review by this Court on Writ of Certiorari. Clearly, the reasons raised by Petitioner in this Court do not meet the established criteria. This case is simply one for alleged legal

malpractice which resulted in Summary Judgment against Petitioner. This alleged legal malpractice action did not necessitate a decision on a federal question, constitutional or otherwise. This case of alleged legal malpractice does not involve any questions of imperative public importance. Petitioner has simply not demonstrated any basis for review by this Court.

V. NOTWITHSTANDING PETITIONER'S FAILURE TO SEEK REVIEW OF A MISSOURI COURT DECISION WHERE A FEDERAL QUESTION WAS RAISED FOR REVIEW BY THIS COURT, THE SUPREME COURT OF MISSOURI PROPERLY OVERRULED PETITIONER'S MOTION FOR RELIEF OF ORDER.

Contrary to Petitioner's assertion, the sustention of summary judgment in favor of Respondent has not resulted in manifest injustice. The sole allegation of legal malpractice in the trial court was that Respondent failed to file a timely appeal in a 42 U.S.C. 1983 action which Petitioner filed *pro se*. Where the claim is that an attorney failed in some way to prosecute a claim it must be established that the claim would have been successful but for the attorney's negligence and where there is no theory within the record that would permit recovery, summary judgment is appropriate. *Cain v. Hershewe*, 760 S.W.2d 146, 148-49 (Mo.App. 1988). Even if Petitioner's federal appeal had been timely filed, it would have failed as a matter of law. Petitioner could not show that she was damaged by Respondent's alleged professional malpractice.

In any event, Respondent provided expert testimony by affidavit that Petitioner was not prejudiced by the failure to file an appeal because such an appeal would have been unsuccessful. Petitioner failed to respond to this assertion with expert testimony by counter-affidavit. Generally, a claim for legal malpractice requires expert testimony to establish negligence and causation. *Cooper v. Simon*, 719 S.W.2d 463, 465 (Mo.App. 1986).

Thus, while Petitioner did not perfect an appeal of the entry of summary judgment to the Supreme Court of Missouri and even though the case certainly does not entail a federal question, summary judgment was properly affirmed.

Petitioner's Motion for Relief in the Supreme Court of Missouri questioned the constitutionality of the refusal of the clerk of the Western District of Missouri Court of Appeals to accept for filing Petitioner's Motion for Rehearing. Clearly, this was proper pursuant to Missouri Supreme Court Rule 84.17. It cannot be reasonably questioned that the Missouri Supreme Court is entitled to promulgate appellate deadlines. In any event, Petitioner has abandoned this argument in this Court.

For these additional reasons, the Petition for Writ of Certiorari should be denied.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE SUPREME COURT
STATE OF MISSOURI

No. ____

MARY LOU GRAHAM,
PETITIONER,

VS.

JEAN GOLDSTEIN,
RESPONDENT.

MOTION FOR RELIEF OF ORDER OF MISSOURI COURT OF APPEALS, WD.

COMES NOW MARY LOU GRAHAM, APPELLANT-PETITIONER IN CAUSE NO. W.D. 44101, *AS ABOVE) FROM MISSOURI COURT OF APPEALS, APPEARING IN PROPIA PERSONA PURSUANT TO RULES OF MISSOURI CIVIL PROCEDURE NO. 74.06(D), AND 84.03 TO MOVE THIS HONORABLE COURT TO PERMIT HER RELIEF FROM THE ORDER FILED IN SAID CAUSE JULY 30, 1991 FOR THE FOLLOWING REASONS:

(1) THE AFFIRMATION OF SUMMARY JUDGMENT FOR RESPONDENT WILL RESULT IN MANIFEST INJUSTICE TO PETITIONER.

(2) THE MISSOURI COURT OF APPEALS FAILED TO APPLY ALREADY ESTABLISHED HOLDINGS IN SIMILAR CASES INVOLVING:

A. FALSE ARREST WITHOUT PROBABLE CAUSE;

B. PUNITIVE DAMAGES WITHOUT PROOF OF MALICE;

C. CASES OF SELF-DEFENSE IN ASSAULT & BATTERY;

D. SUMMARY JUDGMENT WHEN ISSUES OF FACT EXIST IN COMPLICATED CASES OF PROFESSIONAL NEGLIGENCE;

(3) THE REFUSAL TO FILE PETITIONER'S MOTION FOR REHEARING BY CLERKS OF MISSOURI COURT OF APPEALS, WD. AUGUST 15, 1991, INDICATED RULES 44.01(E) AND 4.01 CONCERNING USING U.S. POSTAL SERVICE IN MOTIONS AND PAPERS, WAS A VIOLATION OF SAID RULES OF MISSOURI COURT AND VIOLATION OF RIGHTS OF PETITIONER TO DUE PROCESS AS GUARANTEED HER IN BILL OF RIGHTS OF MISSOURI CONSTITUTION AND UL [SIC] S. CONSTITUTION.

TO OBTAIN SAID RELIEF APPELLANT-PETITIONER ATTACHES HER AFFIDAVIT, PURSUANT TO RULE 84.03RMO.RULES OF PROCEDURE TO SEEK REVIEW OF SAID IRREGULARITIES WHICH THREATEN PETITIONER WITH MANIFEST INJUSTICE IF THIS ORDER TO AFFIRM SUMMARY JUDGMENT STANDS. (COPY OF ORDER ATTACHED).

RESPECTFULLY SUBMITTED,

/S/ MARY LOU GRAHAM
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A TRUE COPY OF THE FOREGOING WAS MAILED BY CERTIFIED/RETURN MAIL ON THE 21ST DAY OF JANUARY, 1991 TO ALL PARTIES TO THIS ACTION AS ARE LISTED BELOW:

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